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THE JURISDICTION OF THE UNITED STATES OVER SEDITIOUS LIBEL.

"Sedition is a comprehensive term, and it embraces all those practices whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavor to subvert the government and the laws of the empire."[1] "All writings, therefore, which tend to bring into hatred or contempt the Queen, the Government, or the constitution as by law established, to promote insurrection, or to encourage the people to resist the laws, or the administration of justice, are termed seditious libels."[2] These definitions, drawn from an authority

[1] Per Fitzgerald, J. (afterwards one of the Lords of Appeal in Ordinary, appointed under the appellate jurisdiction act, 1876) in his charge to the jury on the trial of *Reg.* v. *Sullivan* and *Reg.* v. *Pigott.* Ir. State Trials (1868); quoted in chapter xxxiii of Folkard's Law of Slander and Libel (founded upon the treatise of the late Thomas Starkie, Q. C.) (1897). This statement is adopted and followed in *Reg.* v. *Burns and others,* 16 Cox. C. C. 355 (1886), per Cave, J. This whole chapter of Folkard's treatise is very instructive in connection with the subject of seditious libel.

[2] Folkard's Slander and Libel, chapter xxxiii, p. 638.

on the English law, will serve as at least a tentative definition of what constitutes seditious libel. It is our purpose to inquire, first, as to the power of the United States to punish for such libel, and second, as to the extent of that power if it be found to exist. The questions to which we seek an answer are: Has the United States power to punish for seditious libel? What are the limitations of that power? In discussing the first question, we shall lay aside from our consideration the restriction of the first amendment to the Constitution of the United States, which provides that "Congress shall make no law . . . . abridging the freedom of speech or of the press." The bearing and extent of this restriction will constitute the second branch of our inquiry.

In treating of seditious libels, what is said will, we believe, in most instances apply to spoken words. Whether the latter offence is less dangerous to the welfare of the state, and consequently less deserving of punishment will not affect the principles which decide the right of the government to punish for either offence or which determine the extent of that right.

Whether the United States has power to punish for libels affecting the stability and permanency of the government depends, it seems to us, on the principles which decide whether it has power to guard against forces which tend to impair the vigor of the nation, or to take from it the elements which sustain its life. The relation of seditious libels to the existence of legal authority is so well stated in Folkard's treatise that we feel justified in referring again to that writer:[3] "It is necessarily incident to every permanent form or system of government to make provision, not merely for its continuance, but for its secure continuance. To that security the confidence and esteem of the people is indispensable; and, therefore, it is essential to prohibit malicious attempts to produce the mischiefs of political revolution, by rendering the established constitution odious to the society which has adopted it. The State and Constitution being the common inheritance, every attack, made upon them,

[3] Chap. xxxiii, p. 637.

which affects their permanence and security, is in a degree an attack upon every individual and concerns the rights of all. It is, therefore, a maxim of the law of England, flowing by natural consequence and easy deduction from the great principle of self-defence, to consider as libels or misdemeanors every species of attack by writing or speaking, the object of which is wantonly to defame that economy, order, and constitution of things which make up the general system of the law and government of the country."

In creating a government the "people of the United States" must have intended to grant it such powers as were necessary and proper to enable it to maintain its integrity, and to secure itself against destruction. It is unreasonable to charge them with a purpose to create a power which should be without authority to resist a blow aimed at its own existence. Had the power to "suppress insurrections" not been incorporated into the express language of the Constitution, there would probably be no one so hardy as to deny that it would, nevertheless, have existed. The spectacle of a nation pretending to an equality of rank with the great nations of the globe, and stripped of all power to secure itself against internal strife, would be, to say the least, an anomaly. The fact that published attacks upon the government, whether verbal or written, do not so closely affect the welfare of society and the existence of the nation, does not affect the principle involved. A national government cannot, it is submitted, be deprived by implication of those powers which are necessary to provide against direct or indirect attacks upon its own existence.

An analogous principle is applied in reference to the power of courts to punish for contempts committed against them. Thus in *U. S.* v. *Hudson & Goodwin*,[4] Mr. Justice Johnson says: "Certain implied powers must necessarily result from the nature of their [*i. e.* courts'] institution. . . . To fine for contempt—imprison for contumacy—enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt

[4] 7 Cranch, 32, at p. 34 (1812).

possess powers not immediately derived from statute."[5] As supporting the same general principle, we may refer to the case of *Anderson* v. *Dunn*,[6] where it was held that the House of Representatives had inherent power to punish contempts committed in its presence, and that too, though the Constitution expressly authorizes the punishment of members, but is silent as to such power over others. "That such an assembly (as the House of Representatives)," says Mr. Justice Johnson, "should not possess the power to suppress rudeness or repel insult, is a supposition too wild to be suggested."

Is it any more in accord with reason to suppose that the Government of the United States does not have inherent power to adopt such measures as are necessary and proper to secure its own existence? We have been arguing from the general principle that a government must be conceded power to provide for self-preservation. This, we believe, must be admitted even upon a strict construction of the Constitution. For certain powers are expressly granted to the government; to exercise these it must exist, and, therefore, it may pass laws which are "necessary and proper" to secure its existence. In order to do this it must be able to provide against such forces as tend to weaken by degrees the foundation as well as against such as tend to overthrow by violence the whole structure.

The exercise of power of this description has been upheld as constitutional in the Chinese Exclusion cases, which, having been decided in comparatively recent years, may be regarded as of undoubted authority. The facts of those cases involved the right of the United States to exclude the Chinese from its territory, and in upholding such right the Supreme Court does so, not by implying the power from any particular express power, but on the ground that an independent nation has power to take such measures as are necessary for its own preservation. Thus, in *Nishimura Ekiu* v. *United States*,[7] the court says, speaking through

[5] V. also *Ex parte Terry*, 128 U. S. 289 (1888) at p. 302 and cases there cited; IV. Bl. Comm., 286; *State* v. *Frew*, 24 W. Va. 416 (1884), etc.

[6] 6 Wheaton, 204 (1821).

[7] 142 U. S. 651 (1891).

Mr. Justice Gray: "It is an accepted maxim of international law, that every sovereign nation has the power, *as inherent in sovereignty, and essential to self-preservation,*[8] to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[9]

We also find support for the implied right of the United States to punish for offences aimed against its national integrity in the implied right which exists to protect the lives of its officers and insure them security in the exercise of their official duties. Seditious libel may be directed against the Constitution or the officers of government,[10] and just as the United States has the power to adopt such measures as are necessary and proper for preserving the Constitution, and for protecting the lives of its officers in order that they may exercise their constitutional duties; so it is claimed, it may adopt such measures as are necessary to guard against seditious libel directed against them, which is a danger, less apparent perhaps, but more insidious. The measures which are necessary do not differ in respect to the principles which authorize them, but only in the question of the remoteness of their dangerous influence upon the body politic. The same principle which establishes the propriety of federal action to protect the life of a judge, authorizes such action to protect that judge from a wanton and contumelious attack upon his office or upon his exercise of his official duties. Similarly the right to punish for an attempt upon the life of the President of the United States, or for the accomplished fact, includes the right to punish for a wanton and malicious publication which incites to such a deed. That the United States does have full power to protect its officers in the exercise of their duties seems to us too clear to admit of a doubt and we shall cite cases to sustain our contention.

[8] Italics our own.

[9] See also *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1892), where the principles of this case are reiterated and emphasized. Also *Chae Chan Ping* v. *United States,* 130 U. S. 581 (1888).

[10] V. Folkard's treatise, where the division is into such as are aimed against (a) the Constitution; (b) the King; (c) the Government.

How far the clause in the Constitution defining treason ought to affect this general right will be discussed later.

In re Neagle,[11] it will be remembered, a United States marshal was arrested by a sheriff in the State of California for the murder of one Terry. Terry had threatened violence to Mr. Justice Field, and trouble being anticipated, the marshal, by direction of the Attorney-General of the United States, accompanied Mr. Justice Field when he went for the purpose of performing his judicial duties to the district where Terry lived. No law of Congress authorized a marshal to be appointed for such purpose. As was anticipated, Terry attacked Mr. Justice Field, and Neagle, the marshal, to protect him and also himself, shot and killed Terry. He was taken into custody by the state court, but on petition to the United States Circuit Court and appeal to the Supreme Court, he was discharged on the ground that he acted under the authority of a law of the United States. Mr. Justice Lamar, with whom concurs Mr. Chief Justice Fuller, dissents, on the ground that the "law" should have been an act of Congress. But from the general principle upon which the majority proceeds there is no dissent. That principle is at one place[12] thus expressed: "If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of his duty, than the fact that if he was murdered his murderer would be subject to the laws of a state and by those laws could be punished, the security would be very inefficient. . . . We do not believe that the Government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected." This establishes the right of the government to protect the life of a justice of the Supreme Court in the discharge of his duties. This being so, it follows as a corollary that the government has the right to punish for the taking of that life, at least where this occurs while the judge is exercising his official rights.[13] This, it

[11] 135 U. S. 1 (1889).

[12] P. 59.

[13] It will be remembered that under the statute 25 Edw. III., c. 2, the last species of treason enumerated was "if a man slay the chancellor,

seems, includes the right to protect a judge from such acts as lead to violence. In this latter class is included one form of seditious libels. The court in this case refers in passing to the clear right of the United States to punish for interference with the United States mail. How much more should power be properly and logically implied to preserve *officers of the government* from harm.

In *Logan* v. *United States*[14] it was held to be an offence punishable by the United States to injure and oppress citizens in a free exercise of a right secured to them by the Constitution and laws of the United States. Mr. Justice Gray says, among other things: "The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice."[15] Surely this principle authorizes the United States to punish for the murder of a judge of the United States or for an attempt to murder such judge while in the exercise of his duties, for in such case he is in the exercise of a right secured to him by the Constitution. The same principle authorizes similar legislation for the protection of the lives of all federal officials. The laws of the United States must be enforced and since to such enforcement the action of men is necessary, we can see no error in the decision which implies from the Constitution the power in the general government to adopt such measures as insure protection to these persons, upon whom the duties of federal office have fallen.

Nor does it seem to be any stretch of construction to extend this protection to federal officials, although at the time when the crime is committed such official is not immediately engaged in the exercise of his prescribed duties. If the purpose of the crime is to prevent his exercise of future duties it is almost, if not quite, as serious as though the official at the time the blow was struck had been immediately

treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their officers": IV. Bl. Comm., 84. V. *infra*.

[14] 144 U. S. 263 (1891).

[15] Cf. also *Tennessee* v. *Davis*, 100 U. S. 257 (1879); *Ex parte Siebold*, 100 U. S. 371 (1879).

engaged in fulfilling some active duty of his office. Still further, admitting that the purpose of the criminal is not to strike at the official character of the man, but to gratify some personal spite, yet, it seems to us, the result is the same —the vigor of federal action *is* impaired by the act done. The United States has authority under the cases cited to enact measures to secure itself in full vigor of action, and therefore, to punish such acts as interfere with its operation within its sphere of action.

Before applying these principles immediately to the question of seditious libel, we wish to consider one objection sometimes made against the doctrine we are advocating; viz, that the Constitution provides that: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."[16] It is argued that at common law and under the statute, 25 Edw. III., c. 2, it was high treason to "compass or imagine the death of our lord the king,"[17] that by analogy it must be treason to attempt or take the life of the President or the United States, and that Congress cannot punish such act merely by failing to call it treason.

Now in answer to this argument it may be said, in the first place, that although the Constitution declares that treason shall consist only in the enumerated offences, yet the Constitution itself provides in another article[18] that Congress shall have power "to provide for the punishment of counterfeiting the securities and current coin of the United States." This is conclusive of the fact that the framers of the Constitution did not intend the definition of treason to prevent the punishment of other offences, merely because they had been treason under the English law, for it will be remembered that under the statute, already referred to, the sixth species of treason is "if a man counterfeit the king's money."[19] We referred above to the case of *In re Neagle,* in which the court proceeds on the principle that the United

[16] Article iii, § 3.

[17] IV Bl. Comm., 76; 1 Hale's P. C., 107; Foster's Crown Law, 193.

[18] Article i, § 8.

[19] 25 Edw. III., c. 2, IV. Bl. Comm., 84.

States has been granted the power to protect the federal judges in the exercise of their judicial duties. Will it be contended that to kill a federal judge, sitting in the discharge of such duties would not be a crime punishable by that government whose laws he is enforcing? And yet such act would have been treason under the statute of Edward III.[20]

But a more conclusive answer, we believe, is found in the following considerations. The section of the Constitution defining treason occurs in the third article of the instrument. It will be remembered that this is the article relating to the *judicial* power. That this provision is intended to apply more in particular to that branch of the government is emphasized by the fact that the succeeding paragraph begins: "The Congress shall have power to declare the punishment of treason, etc." This definition of treason is addressed immediately to the judiciary and prevents their deciding that any act is treason except what is clearly defined by the language of the section to be such. Indirectly, no doubt, it does affect the action of Congress; for, should Congress pass a law making some other offence treason, the judiciary under this section would be bound to disregard it since they are directed to treat as treason only the enumerated offences. That this is the scope and purpose of this language clearly appears when reference is had to the mischief sought to be remedied. For the mischief was, according to Mr. Justice Blackstone,[21] that "by the antient [*sic*] common law, there was a great latitude left *in the breast of the judges*[22] to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create *abundance of constructive treasons,*[22] that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such." The commentator cites an extreme example of this to illustrate the arbitary construction of the judges: "Thus," he says, "the *accroaching*, or attempting to exercise, royal

[20] 25 Edw. III., c. 2, IV Bl. Comm., 84.

[21] IV Bl. Comm., 75.

[22] Italics our own.

power (a very uncertain charge) was, in the 21 Edw. III., held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90 *l.*:[24] a crime, it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason."

Such was the arbitrary and tyrannical exercise of power that the framers of the Constitution sought to avoid. It clearly explains the propriety of placing the restrictive definition of treason in the article treating of the judicial power and not including it among the limitations upon congressional action, which are enumerated and collected in one section, viz, Section 9 of Article I. That this is the proper view to take of the provision appears further from what is said in the *Federalist*[25] upon this subject: "As new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the Convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional *definition*[26] of the crime."[27]

The question of how far this definition of treason affects federal action for the protection of government officials applies to the subject we have under discussion in two ways; first in respect to its effect upon the right of the national government to protect the lives of its officers. We have been contending that this right is ample and complete, in order that we may use such established right for the purpose of including within it laws punishing seditious libel as one species of laws protecting government officials. Of course, if the constitutional definition of treason should be held to prevent legislation for the protection of the lives of the officers of government our major premise would be destroyed. In consequence of this, therefore, the importance of meeting the argument drawn from the supposed restriction

[24] 1 Hale's P. C., 80.

[25] No. xlii, p. 299.

[26] Italics our own.

[27] V. to the same effect Story's Comm. on the Cons., vol. i, § 1796 ff.

of the announced scope of treason, clearly appears. In the second place, it will be remembered that there was great question in the English law how far words and writings might be held to amount in themselves to treason. For though, in *Pine's Case*,[28] after a review of the ancient cases upon this subject, all the judges resolved "that unless it were by some particular statute, no words shall be treason," yet this seems not always to have been the law,[29] and with respect to writings, "there was no manner of doubt but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law;[30] though of late even that has been questioned."[31]

It is, therefore, of great importance to show that the constitutional provision is not restrictive of the action of Congress in punishing this class of offences against the United States, and we think the considerations suggested above are sufficient to support our contention that the section in question does not hinder such congressional action. It may be noted in passing that one act frequently possesses in itself the elements of more than one crime. Thus, though the killing of the king was treason at the English law, it was at the same time murder. Treason in its very name (*proditio*) imports a betraying, treachery or breach of faith.[32] This was the reason which made it treason to kill the king; for such crime constituted a breach of that allegiance which every subject owed to the person of his sovereign—a personal allegiance unknown under our democratic form of government. But, granting that an act did include in itself a breach of this faith, still if it hinders the smooth and proper working of government, it contains in itself the elements of two offences, and however much the Constitution may be held to prohibit the punishment of an act the entire illegality of which arises from its breach of that faith which should exist between a citizen and the sovereignty, yet where an act shows the second aspect, of impeding the due administra-

[28] Cro. Car., 117.
[29] 1 Hale's P. C., 115.
[30] 1 Hale's P. C., 118, 38.
[31] IV Bl. Comm., 81.
[32] IV Bl. Comm., 75.

tion of the law, it should, to this extent, be punishable. There can be no ground, it seems to us, to claim that the government in so doing is punishing treason, and nullifying the constitutional prohibition by a mere turn of words. The substance of the act punished in the case supposed is no more treason, though the same deed might justify a definition of the act as treason, than an indictment for the murder of the King of England would be a prosecution for treason, simply because the offence also contained in itself the element of treason.

It seems to us, therefore, that the cases deciding that the United States has power to protect its officers in the discharge of their duties, stand unimpaired by the argument above referred to. In consequence of the same reasons, that argument does not forbid the punishment of seditious libel. If, therefore, we can show that the prevention of seditious libel is necessary for the protection of the lives of the officers of the national government, and for their security in the exercise of their duties, we shall have shown that the cases referred to are authorities for the proposition that the United States has jurisdiction to punish for seditious libels of this kind.

That such is true admits, we believe, of no doubt. One who, being absent at the time a crime was committed, yet procured, counseled or commanded another to commit it, was at the common law guilty of the crime as an accessory before the fact,[33] and in general suffered the same punishment as the principal.[34] The guilt of such act was unquestioned, and the punishment meted out shows that the offence was regarded close to the actual crime committed in degree of guilt. Everyone knows that in high treason and misdemeanors no distinction whatever was drawn, but that all were regarded as principals.[35] Still further the counseling and inciting to crime are in themselves criminal though no crime is done in consequence thereof.[36] It is thus evident

[33] 1 Hale's P. C., 616.

[34] IV Bl. Comm., 39; 1 Hale's P. C., 621.

[35] 1 Hale's P. C., 613; IV Bl. Comm., 35.

[36] *Reg.* v. *Gregory,* 10 Cox Cr. Cas. 459 (1867).

what intimate relations the law conceives to exist between the spoken or written incitement to the criminal act and the actual commission thereof.

It appears clear, therefore, that the power to protect the officials of the government from injury must include, in order to be complete and effective, the power to punish such publications as tend in a substantial measure to render their positions unsafe or to impede them in the exercise of their prescribed duties. As we have said before, the protection differs not in kind but merely in degree, and to establish the one establishes the other, unless, perhaps, an express limitation shall be found to exist in consequence of the first amendment to the Constitution forbidding the making of any law abridging the freedom of the press. This is the inquiry which we must pursue in the second part of this paper, but before proceeding to that, it seems worth while to summarize the results of the discussion to the present point.

The power to punish, for seditious libel, it is submitted, results to the United States, first from its inherent right to adopt such measures as are necessary for its self-preservation, and, second from its right to adopt such measures as are necessary to secure its officers in the due administration of their duties. The definition in the Constitution of what shall constitute treason does not affect this question: first, because it was not intended to prevent the punishment of all offences, which had at the common law or under English statutes been held to be treason; second, because its peculiar purpose was to prevent the *judiciary* from enlarging the scope of treason by arbitrary construction, and in the third place because the act punished is not treason, inasmuch as no breach of faith is punished, but the legislation is aimed at interference with the operations of government.

It remains to consider whether the express limitations of the Constitution confine the jurisdiction of the United States over seditious libels, and, if so, within what limits.

It seems to be universally admitted that the amendment which forbids Congress to pass any law abridging the freedom of the press renders unconstitutional all acts of Con-

gress which might have for their object the establishment of a censorship of the press.[37] Admitting that the prohibition of such censorship is within the purview of the article, the more difficult question arises whether this is the limit of its effectiveness. It is well known that it has never been held to protect a personal libel,[38] or a contempt,[39] or blasphemy,[40] or other instances in which spoken or written words had been regarded by the common law as a civil wrong or a public misdemeanor by reason of their interference with individual rights.[41] But if it should be held that the amendment exhausts its force in prohibiting a censorship, it would have to be admitted at once that rather narrow protection is given to the citizen, since this construction would confer upon the legislature the power to visit with severe punishments publications of the most innocent nature. It is exceedingly unlikely that this was the intent of the framers of the Constitution, and Judge Cooley accordingly says: "It seems more than probable that the constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication."[42] He then makes the argument that in the constitutional point of view the press was the agency for bringing persons in authority before the bar of public opinion to answer for any misfeasance in office; that it was, in particular, its freedom for this purpose that was desired, and that "it is a just conclusion, therefore, that this freedom of discussion was meant to be fully preserved; and that the prohibition of laws impairing it was aimed, not merely at a censorship of the

[37] Story on the Constitution, § 1880; 1 Tuck., Black. Comm., App. 297-299; 2 Tuck., Black. Comm., App. 11; 2 Kent's Comm., 17; *Respublica* v. *Oswald,* 1 Dallas, 349 (1788); Cooley's Principles of Constitutional Law, 299; De Lolme, Const. of England, chapter x; IV Bl. Comm., 151; Rawle on Const., chapter x; *Com.* v. *Blonding,* 3 Pick. 304, 313 (1825), etc.

[38] V. *inter alia Barr* v. *Moore,* 87 Pa. 385 (392) (1878); *Morton* v. *State,* 3 Tex. App. 317 (1878).

[39] V. *inter alia Respublica* v. *Oswald,* 1 Dallas, 349 (1788).

[40] *Updegraph* v. *Com.,* 11 S. & R. 394 (1824).

[41] IV Bl. Comm. 15, enumerating various offences by the spoken or written word.

[42] Cooley's Principles of Constitutional Law, 300.

press, but more particularly at any restrictive laws or administration of law, whereby such free and general discussion of public interests and affairs as had become customary in America should be so abridged as to deprive it of its advantages as an aid to the people in exercising intelligently their privileges as citizens, and in protecting their liberties."[43] General language like this, when used in reference to legal principles, must always exhibit the fault of indefiniteness, but in this instance it is important in two aspects: first, as showing that in the mind of this learned writer the liberty of the press guarantees the citizen more protection than freedom from censorship; and second, that this additional protection is peculiarly intended to be applicable in those cases which we are examining, that is, where the citizen undertakes to examine the acts of government or of public officers.

It seems worth while to remember in this connection that the phrase "liberty of the press," which has been so frequently and so eloquently descanted on by American orators, is by no means a native product of American soil. Blackstone, whose commentaries were written more than a quarter of a century before the adoption of this first amendment, uses the phrase, and uses it in a manner which indicates that even then it had become a familiar one.[44] Every student of the law remembers his forcible and eloquent exposition of the meaning of the phrase, and the passage in which it was discussed has been referred to by almost every case involving the principles there discussed. It must have been familiar to those who framed this amendment, and when they use the same phrase used by Blackstone and in no way qualify it, except by adding to it the "liberty of speech," it seems a natural inference that they use it in the same sense in which it was used by him. Judge Cooley, notwithstanding what he says above concerning the scope of the amendment, admits that "in this country it [*i. e.*, Mr. Justice Blackstone's view] has been accepted as expressing the views of those who framed and adopted this amendment."[45] And he cites in

[43] *Ibid.*, 301. Cf. Cooley's Constitutional Limitations, 441, 442.
[44] IV Bl. Comm., 151.
[45] Cooley's Principles of Constitutional Law, 300.

support of this, Rawle on Const., Chap. x, 2 Kent, 17;[46] Story on Const., § 1889; *Com.* v. *Blonding.*[46a] Now Blackstone enumerates seditious libels among offences which are punishable under the law, without a violation of that liberty of the press, to which he gives his full and forcible endorsement.[47] It would follow then that the punishment of seditious libel was not intended by those who framed and adopted this amendment to be considered an infringement of the liberty of the press ,and that such publications were still subject to governmental animadversion.

In *Respublica* v. *Dennie,*[48] a case occurring close enough to the adoption of the amendment to exhibit judicial opinion of its scope, the defendant was indicted for a seditious libel. The indictment was found in the Mayor's Court in Philadelphia, and removed, under the practice of that day, into the Supreme Court, where the trial occurred before Justices Yeates, Smith and Brackenridge. The alleged libel consisted in an attack on democratic government. In his charge to the jury Justice Yeates finds it necessary to draw the line between what is and what is not protected by the constitutional guarantees. A number of the passages in his charge are sufficiently significant to be quoted: "Publish as you please in the first instance without control; but you are answerable both to the community and the individual if you proceed to unwarrantable lengths." "There is a marked and evident distinction between such publications [as are for public information], and those which are plainly accompanied with *a criminal intent,* deliberately designed to unloosen the social band of union, totally to unhinge the minds of citizens, and to produce popular discontent with the exercise of power, by the known constituted authorities. . . . 'The liberty of the press consists in publishing the

[46] The passage in Kent is in substance a fair equivalent (nothing more) of Mr. Justice Blackstone's statement. It is adopted by the Editors of the American and English Encyclopædia of Law (N. S.), vol. vi, p. 1002. It tends to show that Blackstone's statement has by no means been outgrown in the development of civil and political liberty.

[46a] 3 Pick. 304, 313 (1825).

[47] IV Bl. Comm., 151.

[48] 4 Yeates, 267 (1805).

truth, from *good motives* and for *justifiable ends*, though it reflects on government or on magistrates.' "[49] "If the consciences of the jury shall be clearly satisfied that the publication was *seditiously, maliciously* and wilfully aimed at the independence of the United States, the constitution thereof of, or of this state, they should convict the defendant. If, on the other hand, the production was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously . . . . they should acquit the defendant." This case is too clear to be misunderstood. The liberty of the press does not prevent the punishment of seditious libels, and we are given several very tangible criteria as aids in determining whether or not the libel in question is of a seditious character. It will be important to remember these principles at a later stage of the discussion. Our main purpose in citing the case at this point is to show that though the constitutional guarantee may demand greater strictness in defining the scope of seditious libel than would exist in its absence, it does not divest that offence of guilt or of punishable character. This decision was, of course, made under the Constitution of Pennsylvania, but the provision of that instrument in this respect is in no way narrower than that of the Federal Constitution.

It would be more satisfactory if we were able to cite decisions of the Federal Supreme Court to enforce this position, but unfortunately, no decision has been made by that tribunal upon the point. It will be remembered, however, that in 1798 the so-called Sedition Act was passed by Congress, and that its constitutionality was seriously doubted by a large part of the people. Its impolicy is, of course, a subject wholly foreign to the purpose of this paper and gives rise to a question which we do not intend to enter upon. The only aspect that concerns us in this discussion is its constitutionality. It expired by virtue of its own limitation in 1801 and was never passed on by the United States Supreme Court, so that we have no authoritative decision as to the legality of its enactment by Congress. But, as is well

[49] Quoting from General Hamilton in Crosswell's Trial, pp. 63, 64.

enough known, it gave rise to almost unlimited discussion, and arguments in regard to its constitutionality are by no means few. It is our purpose to consider some of the more important of these, since the criticisms of this act form the closest precedents we have in our country's history, bearing upon the question how far the jurisdiction of the United States over seditious libel is limited.

The language of this act[50] was in substance as follows: "If any person shall write, print, utter or publish, ... any false, scandalous, and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them into contempt or disrepute; or to excite against them, or either of them the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein for opposing or resisting any law of the United States or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, etc.," shall on being convicted be punished, etc. It is of importance to notice at once that the scope of this act is so broad that it covers not alone publications, the purpose of which is to stir up sedition, etc., but even those whose only purpose is to defame. In considering, therefore, the opinions which have been passed on this act, where the exact part of the act objected to is not named, it is important to remember that one who approves the act, admits the power of Congress to punish for every species of libel named in it, while one who condemns it, may do so not on the ground that all of its provisions are unconstitutional but that some are, and that with these the rest must fall. It is believed that it was the fact that the act went too far *in certain of its provisions* that decided the attitude of numerous persons

[50] Act of July 14, 1798.

towards the act as a whole. Undoubtedly there were prosecutions sustained under it which would now be regarded as oppressive and inconsistent with the liberty of the press, but this is not conclusive of the question whether an act which was confined in its scope to a narrower and more dangerous class of cases would not meet with general approval so far as its constitutional aspect is concerned,—the question of its policy entirely aside.

Remembering this we turn to examine briefly the support or attack which the act received from various sources which seem worthy of consideration. In the first place, prosecutions in Circuit Courts of the United States were sustained under it. We may refer to the *Trial of Matthew Lyon,*[50a] in the Circuit Court of the United States for the Vermont District before Paterson, J., circuit judge, and Hitchcock, J., district judge: *Trial of Thomas Cooper,*[50b] in the Circuit Court of the United States for the Pennsylvania District before Chase, J. (in this case the act is distinctly approved:[50c] *Trial of James Thompson Callender,*[50d] in the Circuit Court of the United States for the Virginia district, also before Chase, J.:[51] *Trial of Anthony Haswell,*[51a] in the Circuit Court of the United States for the Vermont District before Paterson, J. We have, therefore, the decision of three federal judges in favor of the constitutionality of the measure. It is impossible for us, even if it were desirable, to consider and discuss in this paper the facts of these various cases. It is sufficient to say that the publications upon which indictments were sustained, were, in at least two of the cases, of a character which at present would be regarded as far from endangering the peace

[50a] Wharton's State Trials, 333 (1798).

[50b] *Ibid.*, 659 (1800).

[50c] P. 670.

[50d] *Ibid.*, 688 (1800).

[51] It will be remembered that it was the conduct of Judge Chase on this trial that formed one of the principal complaints against him when he was afterwards tried by the United States Senate upon articles of impeachment. Eighteen Senators voted that he was guilty of "rude, contemptuous and indecent conduct during the trial." Sixteen voted otherwise. This, of course, was not a two-thirds majority and hence failed to convict. It was not, however, for executing the act that he was tried. V. Chase's Trial; Bullitt on the Constitution, p. 317.

[51a] *Ibid.*, 684 (1800).

and good order of the government. It is important to remember, however, the difficulties which then confronted a new and untried form of government and to reflect that what at present seems sufficiently mild and harmless might under those circumstances, with some show of reason, be regarded as dangerous and flagitious. It is to be noted, however, that the prosecutions *were sustained* by these judges even where the publication was of this milder nature, showing that the judges would have been still more ready to uphold an act punishing publications more openly and wantonly seditious.

As illustrative of the same attitude towards the Sedition Act we may refer to Addison's Charge to the Grand Jury on the "Liberty of Speech and of the Press."[52] In this discussion the constitutionality of the act is directly considered and upheld, the judge regarding the act as declaratory of the common law. Blackstone's exposition of the liberty of the press is quoted at length and fully endorsed as a proper interpretation of the phrase and indicative of the scope intended to be given to the constitutional amendment.[53]

On the other hand it is well known that the Sedition Act gave rise to a storm of disapproval. How much of this was directed against the policy of the act and how much against the constitutionality of it, it is impossible to decide. It is well known that Jefferson, whose administration succeeded that in which the act was passed, thoroughly disbelieved in its constitutionality.[54] But more important than the attitude of Jefferson, perhaps, are the expressions of dissatisfaction that came from the States of Virginia and Kentucky embodied in the famous "Virginia and Kentucky Resolutions." The Virginia resolutions[55] in unqualified language denounce the act as unconstitutional, both on the ground that it is an exercise of a power nowhere delegated and on the ground

[52] Addison's Pennsylvania Reports, App. 270.

[53] V. also in support of the constitutionality of the measure the "Report of a Committee of Congress on the Alien and Sedition Laws," on the twenty-fifth of February, 1799.

[54] Letter to Stephens Thompson Mason (October 11, 1798), Writings of Jefferson (edited by Ford), vol. vii, 283; letter to John Taylor (November 26, 1798), *ibid.*, 311.

[55] Virginia Resolutions of 1798: IV Elliot's Deb., 528.

that it transgresses the limitations secured by the first amendment. In answer to these resolutions, the Legislature of Massachusetts explicitly declared its belief in the constitutionality of the measure and supported this view by an answer to both objections urged by Virginia.[56] In agreement with this view are the resolutions of New York,[57] Connecticut,[58] New Hampshire[59] and Rhode Island.[60] Delaware[61] and Vermont[62] answered the resolutions by pronouncing them an unjustifiable interference with the general government and authorities of the United States.

The Kentucky resolutions, passed on November 10, 1798, and the supplementary resolutions of November 14, 1799,[63] still more emphatic than the Virginia resolutions in decrying the act, lose much of their force when we remember that it was in these famous resolutions that the passage occurred: "*Resolved,* That . . . the several states who formed that instrument [the Constitution] being sovereign and independent, have the unquestionable right to judge of the infraction; and that a nullification by these sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy" Every one knows what has become of the doctrine of nullification. It is unfortunate for the strength of the argument directed against the Sedition Act, that it should have occurred in such connection, for whatever might independently be said of the considerations for and against its constitutionality, when they occur in conjunction with this doctrine, it is impossible not to believe that the same views of the Federal Government, which induced the claim of the right on the part of the state to nullify its acts,were the principal grounds upon which the Sedition Act was regarded as unjustifiable. Even the Virginia reso-

[56] Resolutions of Massachusetts, February 9, 1799, IV Elliot's Deb., 533.
[57] *Ibid.*, 537.
[58] *Ibid.*, 538.
[59] *Ibid.*, 539.
[60] *Ibid.*, 533.
[61] *Ibid.*, 532.
[62] *Ibid.*, 539.
[63] *Ibid.*, 540 and 544.

lutions, though couched in more temperate language, give countenance to this exploded doctrine. It must, therefore, be remembered in considering these resolutions adverse to the constitutionality of the act that the theory of the general government, from which they are developed, is a theory tainted with error. But even granted to them their full weight as the expressions of the views of two states, the answers made by the legislatures of the other states would lead to the conclusion that the prevailing view at the time was in favor of the constitutionality. Nor is it any answer to this to suggest the later history of the Federalists as indicative of the attitude of the majority towards the constitutionality of the measure. Such history is satisfactorily explained on the ground that the *policy* of the act, not its constitutionality, was condemned.

Later writers on constitutional law have not been clear in expressing their opinions on the validity of the act. Mr. Justice Story expressly declines to commit himself.[64] Mr. Justice Cooley in a note to Story's Commentaries says: "It [the act] was far from being as questionable in point of constitutional authority as some other acts which have been adopted from a supposed necessity, and enforced almost without objection in troublous times."[65] On the other hand Von Holst in his work on the "Constitutional History of the United States" says:[66] "Suffice it to say, that, for a long time, they [*i. e.*, the Alien and Sedition Laws] have been considered in the United States as unquestionably unconstitutional." For this broad statement he cites no authority whatever.

From the views upon the Sedition Act to which we have made reference it appears that contemporary exposition was far from being unanimous against its constitutionality. In fact, the majority of the states acknowledge the authority of Congress to pass the act. It is uniformly upheld when prosecutions under it are attempted, and we have no judicial decision against its constitutionality. Later writers on the

[64] Commentaries on the Constitution, § 1891. Cf. § 1294.
[65] Vol. ii, p. 181.
[66] Vol. i, p. 142.

Constitution have not been unanimous in condemning it on this ground, Mr. Von Holst's opinion to the contrary notwithstanding.[67] While, therefore, it may be impossible to come to a definite conclusion as to the validity of the act, it seems to be clear that there are considerations in favor of its constitutionality which render the decision a very close one, and which might be sufficient to make a case comparatively clear should it arise during a time so trying as that in which the Sedition Act was passed.

Laying aside, therefore, entirely the question as to the policy of the act it seems to us that whatever constitutional grounds exist for attacking it, arise not because it is an act to punish sedition, and not within the delegated powers of Congress, but because the act is too broad, and includes publications which under modern conditions are not seditious, publications which do not endanger the life of the state, or impede the officers of the government in the exercise of their duty. The application of the act to publications of a more or less innocent character was, we believe, the great reason for arousing enmity to it, and for causing inventive against the principles which supported it. That it may have transcended by its terms the power vested in Congress, in that it included in its scope publications not strictly seditious, we do not hesitate to admit; at the same time we just as unhesitatingly contend that the guarantee that the liberty of the press shall not be abridged cannot be said to be shown by the comments and criticisms on the Sedition Act to allow violent and wanton attacks on government for the purpose of stirring up resistance to its authority, and bringing about its ultimate overthrow.

The fair objection to the Sedition Act, we believe, is that it failed to draw the line between such publications as vitally affected the security and vigor of the government and such as did not. The English Constitution boasts with that of America, a "liberty of the press," and yet it does not hesitate

[67] V. also the general language in Byard on the Constitution, 147 (1834); Flander's Constitution, § 455 ff. (1885); Rawle on the Constitution, 123 (1829). Tucker on the Constitution, vol. ii, p. 669 (1899) will be found in support of Mr. Von Holst's view, and also Bullitt on the Constitution, 317 (1899).

to admit that publications may materially and seriously affect the government and its officers, and that these are proper subjects for punishment. In doing so it in no sense admits that it is abridging the liberty of the press, but always contends that it is bridling its licentiousness. This distinction, so clearly drawn by Mr. Justice Blackstone, has been adopted without question by American courts in other classes of illegal publications. Why should they hesitate to apply it in distinguishing from a constitutional point of view, what does and what does not infringe that liberty?

The form of government of the United States contains in itself the means of changing either its policy or its structure by constitutional measures. The advocate of such changes who urges the exercise of constitutional rights for dislodging the party in power or for amending the Constitution can, with perfect propriety, we think, claim that he is within the protection of the constitutional amendment. It is when he passes this line and urges illegal and unconstitutional measures to replace the governing party or to overthrow the form of government, that there arises an abuse of that liberty of speech and of the press, which is intended to be secured to the people. This it seems to us furnishes a distinction in a sense fundamental. It will always remain to consider whether the publication in question has so far passed the line referred to as to endanger the security or efficiency of the Federal Government.

To be sure this may not be an easy line to draw. But is it more difficult than the line which is constantly required to be drawn between fair comment and libellous writings? The function of the jury must necessarily be considered and it might be left to them to say whether a publication does pass beyond the line of what is justified, while to the judge it remains to tell them whether the publication is of such a character that it may be so construed.

The distinctions drawn by Folkard in his treatise on Libel and Slander in the chapter[68] to which we have referred several times in the opening of this paper show how the English courts have worked out the question as to where is the

[68] Chapter xxxiii, p. 637.

proper place to make the distinction. We have already referred to the principles laid down by Justice Yeates in *Respublica* v. *Dennie*, and the distinctions there drawn,—distinctions fairly definite in form when we consider the nature of the subject-matter to which they must be applied. Particularly worthy of reference again is the quotation there made from General Hamilton in *Crosswell's Trial:* "The liberty of the press consists in publishing the truth, from *good motives* and for *justifiable ends,* though it reflects on government or on magistrates." This gives us a boundary line within which the guarantee of the Constitution is still operative, and thus satisfies the views of those writers who think that the language of the amendment should not be narrowed to a mere prohibition of governmental censorship.

To sum up in brief the conclusions at which we have been able to arrive in this second part of the discussion: we find ground to believe that the language of the first amendment securing the liberty of the press, was used in the sense in which it was understood under the English system of government, and was not intended to prohibit action on the part of Congress against the licentiousness of the press, when such licentiousness affected in a material and serious way the security of the government or the effectiveness of its action. The Sedition Act of 1798 forms the closest precedent in our history in deciding the questions which arise in determining the scope of the liberty of the press; but inasmuch as the constitutionality of that act was never passed on by the Supreme Court of the United States, we have no authoritative declaration of its validity. If it passed beyond the bounds of what was authorized by the Constitution, it would seem to have done so, not so much because a measure of this nature is not within the implied powers of Congress, as because the act included in its denunciation publications which would not now be regarded as affecting the safety or efficiency of government, and, therefore, not seditious. To draw the line between what does impair the vigor of governmental action and threaten its existence, and what does not, and hence to decide what is without and what within the liberty of the press is the really difficult problem, but not more so, apparently, than the solution of similar questions in allied cases of libel.

Judges may differ as to where this line should be drawn; patriotic and intelligent men may differ as to whether it is politic for Congress to enact such legislation at all, and may point to the decline and fall of the party that passed the Sedition Act as a lesson of history: but if such legislation is passed the line between what does and what does not seriously affect the stability and efficiency of government is, we believe, when correctly drawn, the line which separates what is a constitutional restriction from what is not. The power of the United States, as we have sought to show, results from its power to maintain its own integrity and establish its own efficiency. Seditious libels we have sought to show are such as threaten to impair that integrity and destroy that efficiency. Over such libels, therefore, the jurisdiction of the United States must be held to exist in order that the true balance between the liberty and licentiousness of the press may be maintained within the jurisdiction of the nation, as well as within that of the state.

Henry Wolf Biklé.